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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1942

No. 319

FIDELITY ASSURANCE ASSOCIATION, A CORPORATION, DEBTOR, AND
CENTRAL TRUST COMPANY, TRUSTEE FOR FIDELITY ASSURANCE ASSO-
CIATION, *Petitioners,*

vs.

EDGAR B. SIMS, AUDITOR OF THE STATE OF WEST VIRGINIA, AND EX-
OFFICIO INSURANCE COMMISSIONER OF THE STATE OF WEST VIRGINIA;
ROSS B. THOMAS AND H. ISALAH SMITH, WEST VIRGINIA STATE
COURT RECEIVERS; BANKING COMMISSION OF WISCONSIN; CHAS.
R. FISCHER, COMMISSIONER OF INSURANCE AND PERMANENT RECEIVER
FOR DEBTOR CORPORATION IN AND FOR THE STATE OF IOWA; JOHN B.
GONTRUM, INSURANCE COMMISSIONER OF THE STATE OF MARYLAND;
DEWEY S. GODFREY, MISSOURI STATE COURT RECEIVER; L. H.
BROOKS, TRUSTEE, FREDERIC LEAKE AND A. L. GOLDBERG, JR.,
TRUSTEE; AND SECURITIES AND EXCHANGE COMMISSION.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT, BRIEF IN SUPPORT
THEREOF AND MOTION AS TO THE RECORD.**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.**

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Your petitioners, Fidelity Assurance Association, a corporation, Debtor, and Central Trust Company, Trustee for Fidelity Assurance Association, respectfully pray that a writ of certiorari issue to review a decree of the United

States Circuit Court of Appeals for the Fourth Circuit entered on June 16, 1942, reversing an order of the United States District Court for the Southern District of West Virginia which order had approved the petition of Fidelity Assurance Association for reorganization under Chapter X of the Bankruptcy Act, and remanding the proceeding to the said District Court with directions to dismiss the petition. An order staying the mandate has been entered by the Circuit Court of Appeals (R. 398).

Opinions Below.

The opinion of the District Court is a part of the record (R. 3-38) and is reported in 42 Fed. Supp. 973. The opinion of the Circuit Court of Appeals is a part of the record (R. 363-388) and has not yet been reported.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (28 U. S. C. A. 347) and Section 24(c) of the Bankruptcy Act (11 U. S. C. A. 47(c)).

The decree of the Circuit Court of Appeals was entered on June 16, 1942, (R. 387) and a petition for rehearing was denied by order entered by said court on July 22, 1942 (R. 397).

Statutes Involved.

The issues involve the construction and application to the facts of this case of the Bankruptcy Act, particularly Section 4 of Chapter III and Sections 106(3), 144, and 146 of Chapter X, and of the Investment Company Act of 1940, particularly Sections 2(a)(15) and (17), 3(a)(2), 3(c)(3) and (6), 4(1), 28, 52, of Title I (15 U. S. C. A. 80(a)) and Sections 29(a) and (b) of Title I (11 U. S. C. A. 107(f), 72(a)). The most pertinent provisions of these statutes, not set forth in the Argument, are printed herewith as Appendix A. Article 9, Section 7 of Article 3,

Section 5 of Article 2, Section 12 of Article 2, and Section 45 of Article 3 of Chapter 33 of the Code of West Virginia, and Chapter 46 of the Acts of West Virginia of 1941, the most pertinent provisions of which are printed in Appendix A herewith, and statutes of the same general nature of other states, Tit. 53, Sec. 12 Ala. Code; Ch. 66, Sec. 105 Rev. Code Del., 1935; Ch. 121½, Sec. 101-A, Rev. Stats. Ill., 1939; Ch. 392, Iowa Code 1939; Ch. 45, Art. 12 Baldwin's Ind. Statutes; Ch. 17, Art. 10, Sec. 17-1033, Kans. Stats.; Ch. 72-a, Carroll's Ky. Stats. 1936; Art. 48-a, Sec. 218-234 Ann. Code, Md., 1939; Rev. Stats. Mo., 1939; Ch. 20, Sec. 696, Page's Ohio Code, Ann.; Ch. 28, Tit. 7, Purdon's Pa. Stats.; Pt. 1, Tit. 14, Ch. 4, Michie's Tenn. Code 1938; Title 34-a, Ch. 147-a, Va. Code 1936, Ann.; Sec. 216.01 Wis. Stats., some of which are contained in the record (R. 40-59; 75-89; 203-209) are also involved.

Summary Statement of the Matter Involved.

The material facts are presented in some detail in the opinion of the District Court (R. 3) and in the opinion of the Circuit Court of Appeals (R. 363). Condensed for the purposes of this petition, the facts of the case and the nature of the proceeding are as follows.

NATURE OF THE PROCEEDING.

This proceeding arises under Chapter X of the Bankruptcy Act and was instituted by the filing of a voluntary petition for reorganization by Fidelity Assurance Association, hereinafter sometimes referred to as "Fidelity", in the United States District Court for the Southern District of West Virginia on June 6, 1941.

ORGANIZATION AND BUSINESS OF FIDELITY.

Fidelity was incorporated under the laws of the State of West Virginia, on April 11, 1911, under the name of Fidelity Investment and Loan Association and was authorized

by its charter to buy, sell, and deal in stocks, bonds, and real estate (C. C. A. Opinion, R. 364).

Fidelity's charter was amended in November, 1912, and its name was changed to Fidelity Investment Association. By the amended charter it was authorized to receive payments on annuity contracts in fixed installments or otherwise and to sell certificates, bonds, or other investment securities of any kind on installment or any other plan of payment (C. C. A. Opinion, R. 364). A copy of this charter is, for convenience, printed herewith as Appendix B.

Under these charter powers from November, 1912 until December 31, 1940, Fidelity was engaged in selling its own securities in the form of investment contracts variously known as annuities, income contracts, or, more recently, face-amount installment certificates, and in investing the funds received from the purchaser. This activity brought Fidelity within the scope of Article 9, entitled Annuity Contracts, of Chapter 33, entitled Insurance and Annuity Contracts, of the Code of West Virginia requiring a license from the Auditor of the State of West Virginia, ex-officio Insurance Commissioner, and by the provisions of Section 3 of said Article 9 (Appendix A herewith) the company was required to deposit securities with the State Treasurer as therein provided. Deposits in lesser amounts were also made with the statutory officials of some fourteen other states pursuant to the respective statutes, of the same general character as the West Virginia statute, of those States. Insurance companies are expressly excluded from the provisions of the said Article 9 of Chapter 33 by Section 1 thereof. Fidelity did business in fourteen other states which required no such deposits. A table of the deposits by States, as of the date of the filing of the petition in this proceeding, is found in the Opinion of the Circuit Court of Appeals (R. 366), from which it will be noted that the deposits in West Virginia are substantially in excess of the liabilities to West Virginia creditors.

In the various States the activities of Fidelity were regulated by various officials or departments: in some, the securities department; in some, the banking department; and, in others, the insurance department (R. 330).

While the various types of investment contracts sold by Fidelity differ in some respects, they are all alike in providing for monthly, semi-annual or annual payments of specified sums, of which a sufficient portion was to be set aside in a reserve fund which was to produce the sum required to pay the purchaser the amount of money agreed upon in the contract. The earlier contracts contained no statement as to the basis of the reserve fund. Of the later contracts, some provided for reserves on a $4\frac{1}{2}\%$ basis and some on a 4% basis. All provided that the reserve fund so set aside should "be invested in approved securities and deposited in trust as required by the laws of the State of West Virginia" (R. 6-7). In each of the contracts there was a provision whereby, with slight variation in language as to each particular class or series of contracts, Fidelity agreed to create and maintain a reserve fund for such particular class or series from payments made on contracts of that particular class or series, which reserve fund was to be used for the discharge of its liabilities on that particular class or series of contracts; and on its books Fidelity kept these various series funds separate and distinct, (R. 9). Some of these series funds, the later and larger ones, are solvent. As a whole Fidelity is about 90% solvent (R. 30-31). It has approximately 88,000 contract holders, whose individual claims are relatively small (R. 366).

About 1934 Fidelity issued a contract known as the "Income Reserve Contract Series B", commonly referred to as the "Series B Contract", the sale of which from that time on until December 31, 1940, constituted the major portion of its business. The Series B Contracts contained an optional provision, "Section 6", under the terms of which Fidelity had arranged with an insurance company

for life insurance under the group and/or individual legal reserve life insurance policy covering the original registered holder of the contract, provided he be in good health and be accepted by the insurance company, the said life insurance policy providing that upon the death of the registered holder the insurance company would pay to Fidelity the amount required by Fidelity to declare the contract fully paid. This Series B Contract, when the said insurance feature option was exercised, called for the payment of larger periodic installments. Fidelity arranged with the Lincoln National Life Insurance Company to issue the said insurance policies (R. 6; 368; 357-361).

In December, 1938, the Securities and Exchange Commission filed a bill for injunction against Fidelity in the District Court of the United States for the Eastern District of Michigan alleging that Fidelity was engaged in acts and practices in the sale of its securities which constituted violations of the provisions of the Securities Act of 1933, and in that cause a consent decree was entered, among other things, enjoining Fidelity from failing to meet the deposit requirements of the several states. In the same month a suit for the appointment of receivers was brought by certain contract holders of Fidelity in the United States District Court for the Northern District of West Virginia based on the facts developed in the suit in Michigan; but the bill was dismissed by the District Court for the reason that insolvency was not established, and its action was affirmed by the Circuit Court of Appeals (R. 369).

THE INVESTMENT COMPANY ACT OF 1940.

Congress enacted the Investment Company Act of 1940, effective as to face-amount certificate companies on January 1, 1941 (54 Stat. 789, 11 U. S. C. A. 80a-52) (R. 366), wherein Congress found that investment companies issuing face-amount installment certificates were affected "with a

national public interest" (R. 366) and enacted regulations to govern the sale of face-amount certificates, with which it was immediately apparent that Fidelity could not comply (R. 367).

ATTEMPTED EXTRA JUDICIAL REORGANIZATION.

In a futile effort to meet the situation, on December 31, 1940, Fidelity's corporate charter was amended, and its objects and powers were stated to be, "to issue insurance upon the lives of persons and every insurance appertaining thereto and connected therewith, and to grant, purchase and dispose of annuities", and its name was changed to Fidelity Assurance Association (R. 367). Fidelity had not previously had charter powers to issue contracts of insurance.

Under the West Virginia statutes (Code 33-9-1 and 33-2-12, Appendix A herewith) Fidelity's license, under said Article 9, to issue face-amount installment certificates would not expire until April 1, 1941. The Auditor of West Virginia and ex-officio Insurance Commissioner issued Fidelity a license as an insurance company for the period from January 1, 1941, to April 1, 1941, but with the requirement on the part of the Auditor and the agreement on the part of Fidelity that no insurance would be sold and no new annuity contracts would be sold (R. 370). Except as it may be contended that the sending out of certain riders, hereafter mentioned under the subtitle "Proceedings in the Circuit Court of Appeals", to be attached to certain Series B Contracts, containing Section 6, already in existence, were in violation of the agreement, Fidelity observed the agreement and sold no insurance contracts, sold no new annuity contracts, did no business by virtue of this license, and no changes were made in the books of Fidelity, no transfers were made and no surplus was set up (R. 357).

STATE SUITS.

Fidelity made application for a license as an insurance company for the year commencing April 1, 1941, but the Auditor of West Virginia withheld the license applied for and on April 4, 1941, directed Fidelity to discontinue business. On April 11, 1941, the Auditor, pursuant to Chapter 33, Article 2, Section 5 of the West Virginia Code, with a view to rehabilitation (R. 252-253), filed a bill in the Circuit Court of Kanawha County to take possession of the assets of Fidelity, and, without objection by Fidelity, receivers were appointed by said court. The Auditor of West Virginia notified corresponding officials in the other states in which Fidelity was doing business and corresponding proceedings were promptly instituted in eleven other states (R. 370-371).

PROCEEDINGS IN THE DISTRICT COURT.

On June 6, 1941, Fidelity filed its petition in the United States District Court for the Southern District of West Virginia alleging insolvency and praying for reorganization under the provisions of Chapter X of the Bankruptcy Act. On the same day, by ex parte order, the petition was approved and your petitioner, Central Trust Company, was appointed trustee. On June 10, 1941, the District Court directed the various state officials and court receivers to deliver to the trustee all property of the debtor in their hands. On August 9, 1941, while the plenary hearing was in progress and after certain answers and motions of intervenors had been filed, the District Court modified the orders of June 6 and June 10, 1941, requiring the state officials and receivers to turn over to the trustee the assets of the debtor by realizing the turn-over requirements but enjoining state officials and receivers from disposing of such assets (R. 319-334). The West Virginia receivers, under protest, and the Ohio receiver, without protest,

turned over to the trustee the property of the debtor in their custody, while the other state officials and receivers generally retained possession of the deposits in their custody (R. 371).

The Auditor of West Virginia, the receivers appointed in the state court proceeding in West Virginia, officials of other states, receivers appointed by other state courts, and others were permitted to intervene and file answers and motions controverting the allegations of the petition and denying the jurisdiction of the District Court for various reasons, among others, that Fidelity was an insurance company and not subject to the provisions of Chapter X of the Bankruptcy Act, and that the petition was not filed in good faith; and the intervenors moved that the petition be dismissed and the turn-over orders be vacated (R. 3-4; 16-17).

A protracted plenary hearing was had in the District Court after which the District Court found that Fidelity was not an insurance corporation, that the petition was filed in good faith, that the principal assets of Fidelity had been in the Southern District of West Virginia during the six months next preceding the filing of the petition, and that the filing of the petition, though not properly authorized originally, had been ratified by proper corporate action; and the District Court, by decree of January 5, 1942, approved the petition (R. 18-40).

During the hearing, many witnesses testified that Fidelity could and should be reorganized (R. 265-291). Some memoranda looking toward the formulation of plans were presented (R. 383), but no definite plan was acted upon by the District Court.

PROCEEDINGS IN THE CIRCUIT COURT OF APPEALS.

The respondents, other than the Securities and Exchange Commission, appealed from the decree of the District Court to the Circuit Court of Appeals for the Fourth Circuit. The

respondent, Edgar B. Sims, Auditor and ex-officio Insurance Commissioner of West Virginia, filed in the Circuit Court of Appeals a petition for the remand of the case to the District Court and, for the first time, by said petition for remand, introduced into the record a showing that on December 31, 1940, Fidelity had sent out to the holders of Series B Contracts containing Section 6 a letter and certain riders in duplicate, one to be signed and returned to Fidelity and the other to be attached to the contract, by which Fidelity would assume the insurance obligations of such Series B Contracts (R. 339; 341; 342), and in the hearing in the Circuit Court of Appeals it was stipulated that 9,802 of these riders had been signed by the contract holders and returned to Fidelity (R. 361). Fidelity did not in fact assume such insurance obligations for the reason that Fidelity was never authorized by the Auditor of West Virginia to engage in the insurance business (R. 356), and the insurance obligations continued to be carried by the Lincoln National Life Insurance Company as before (R. 357).

The Circuit Court of Appeals found that Fidelity was an insurance company, not eligible for reorganization under Chapter X of the Bankruptcy Act, and that the petition had not been filed in good faith, apparently on the grounds that it was unreasonable to expect that any plan of reorganization could be effected (Sec. 146(3)) and that the interests of creditors would be best subserved in the prior proceedings pending in the state courts (Sec. 146(4)), reversed the judgment of the District Court and remanded the cause with instructions to the District Court to dismiss the petition (R. 372-387).

The decree of the Circuit Court of Appeals reversing the decree of the District Court and remanding the cause with instructions to dismiss, was entered on the 16th day

of June, 1942 (R. 387). The debtor, on the 13th day of July, 1942, presented its petition for a rehearing (R. 389) to the Circuit Court of Appeals, which petition was denied by order of July 22, 1942 (R. 397).

Upon application for a stay of the mandate, by assent of counsel, the Circuit Court of Appeals entered an order on July 22, 1942, staying the mandate upon the condition that this petition for certiorari be presented to this Court within thirty days, and modified the order of the District Court of August 9, 1941, so as to permit the various state officials and receivers to sell assets in their custody for the purpose of conserving the estate (R. 398). Learning that some of the respondents considered the modification of the order of August 9, 1941, by the order of July 22, 1942, as a license to sell the assets in their custody for liquidation, your petitioners, on August 7, 1942, filed a motion in the Circuit Court of Appeals for modification of the amendatory order of July 22, 1942, so as to make it clear that the consent to the sale or exchange of assets was for conservation only and not for liquidation (R. 401). The necessity of sending the record to this Court in time to permit the presentation of this petition within thirty days from July 22, 1942, prevented an opportunity for a ruling on said motion by the Circuit Court of Appeals, but, if your petitioners are informed that in disregard of the purposes and intent of the modification order of July 22, 1942, and pending action upon the motion for clarification of August 7, 1942, any of the respondents contemplate selling the assets in their custody for liquidation, these petitioners will ask for a hearing upon said motion.

Questions Presented.

(1) Is Fidelity Assurance Association an insurance corporation within the Bankruptcy Act and particularly within Chapter X thereof?

(a) Has not Congress by the Investment Company Act of 1940 definitely classified face-amount certificate companies, such as Fidelity (and, we may say, Fidelity itself (R. 366)) as investment companies subject to bankruptcy as distinguished from insurance companies excluded from bankruptcy?

(b) Under the Bankruptcy Act, and particularly Chapter X thereof, is the character of a corporation to be determined by its charter powers, or by the character of its business activities and its obligations sought to be reorganized?

(c) Under the Bankruptcy Act, and particularly Chapter X thereof, if a corporation is to be classified as within or without the Bankruptcy Act by its charter powers, is it to be classified by the charter powers under which it has done business, acquired and managed its assets, and incurred its obligations, or is it to be classified by recently acquired charter powers, sought for the purpose of extra judicial reorganization, under which it has done no business other than such acts as have merely carried on for a short time its previously established business, and has done no other acts except such as were incident to an abortive attempt to reorganize extra judicially?

(2) Does it appear from the record that the petition of the debtor has not been filed in good faith, as the term is employed in Section 146 of Chapter X of the Bankruptcy Act?

(3) In advance of the presentation of a plan of reorganization, the presentation of which has been rendered impracticable by litigation in which the basic jurisdiction of the District Court has been questioned, and in advance of consideration of any plan by the District Court, can it be said that the record shows that "it is unreasonable to expect that a plan of reorganization can be effected"?

(b) Does it appear from the record that the several twelve prior proceedings in the courts of twelve different States (R. 370-371), with their respective territorial limitations, will subserve the interests of the creditors better than a single proceeding, in the United States District Court for the Southern District of West Virginia, in which the court would have jurisdiction over the assets of Fidelity wherever they may be located? (Bankruptcy Act, Sec. 111; 11 U. S. C. A. 511.)

(c) Does it appear from the record that these several State court proceedings will afford the creditors the safeguards provided by the Investment Company Act of 1940 and Chapter X of the Bankruptcy Act, in a subject matter which the Congress has expressly found to be affected with a national public interest? (Investment Company Act of 1940, Title I, Sec. 1(a), 29(b).)

(3) Should not this Court, upon the record, reverse the decree of the Circuit Court of Appeals and affirm the decree of the District Court approving the petition?

Reasons Relied On for the Allowance of the Writ.

(1) The Circuit Court of Appeals classified Fidelity as an insurance company contrary to the unmistakable classification of corporations of the type of Fidelity by Congress as face-amount certificate investment companies, and not as insurance companies, under the Investment Company Act of 1940 (Argument, p. 19 hereof).

(2) The Circuit Court of Appeals has decided an important question of federal law arising in the administration of the Bankruptcy Act, and particularly Chapter X thereof, which has not been, but should be, settled by this Court, namely, what is an insurance corporation within the meaning of the Bankruptcy Act. Indeed, there is no decision of this Court laying down the principles by which corpora-

tions excluded from bankruptcy, expressly or by implication, are to be classified (Argument, p. 24 hereof).

(3) The Circuit Court of Appeals has decided the federal question of what is an insurance corporation within the meaning of the Bankruptcy Act in a way that is probably in conflict with applicable decisions of this Court. There is no decision of this Court deciding what is an insurance corporation, or laying down the principles of classification, within the meaning and purposes of the Bankruptcy Act; but in other situations and applications this Court has laid down the principle of classification by corporate activities. If this principle of classification be applicable under the Bankruptcy Act, then the decision of the Circuit Court of Appeals is in conflict therewith (*Bowers v. Lawyers Mortgage Company* (1931), 285 U. S. 182; *U. S. v. Home Title Insurance Co.* (1931), 285 U. S. 191), (Argument, p. 26 hereof).

(4) There is no decision of the Supreme Court of Appeals of West Virginia classifying Fidelity, or other corporations engaged in like activities, as or as not an insurance company, but it is believed that the statutes of West Virginia unmistakably classify Fidelity as a corporation other than an insurance corporation, and the Circuit Court of Appeals, in attempting to apply the state classification test to Fidelity, has classified Fidelity as an insurance corporation contrary to the plain West Virginia statutory classification as a corporation other than an insurance corporation (Argument, p. 28 hereof).

(5) In deciding that Fidelity is an insurance corporation, the Circuit Court of Appeals has laid down principles of classification which conflict with the principles of classification laid down by other Circuit Courts of Appeals in considering what corporations, including insurance corpora-

tions, are excluded from the provisions of the Bankruptcy Act.

Since the amendment of the Bankruptcy Act in 1910 and in 1938, some Circuit Courts of Appeals have adopted what is called the "state classification" test or principle, but other Circuit Courts of Appeals seem to apply the "corporate activities" test or principle, and some decisions which purport to apply the "State classification" test or principle lean heavily upon the corporate activities factor (Argument, p. 29 hereof).

(6) If the meaning of the decision of the Circuit Court of Appeals that it is unreasonable to expect that a plan of reorganization can be effected is based upon the apparent holding that there can be no reorganization within the meaning of Chapter X of the Bankruptcy Act unless it be the rehabilitation of Fidelity as a going concern, and we believe that is the proper interpretation of the opinion of the Circuit Court of Appeals, then the decision is in conflict with the decisions of other Circuit Courts of Appeals (Argument, p. 38 hereof).

(7) An inquiry into what facts and circumstances lead to a conclusion that the interests of creditors will be best subserved by the prior State court proceedings presents a Federal question for the determination of which the principles have not been, but should be, settled by this Court (Argument, p. 41, hereof).

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all of the proceedings

in the case numbered on its docket No. 4923 and entitled "Edgar B. Sims, Auditor of the State of West Virginia, and Ex-Officio Insurance Commissioner of the State of West Virginia; Ross B. Thomas and H. Isaiah Smith, West Virginia State Court Receivers; Banking Commission of Wisconsin; Chas. R. Fischer, Commissioner of Insurance and Permanent Receiver for debtor corporation in and for the State of Iowa; John B. Gontrum, Insurance Commissioner of the State of Maryland; Dewey S. Godfrey, Missouri State Court Receiver; and L. H. Brooks, Trustee, Frederic Leake and A. L. Goldberg, Jr., Trustee, Appellants, versus Fidelity Assurance Association, a corporation, Debtor, Appellee", and that the judgment of the Circuit Court of Appeals for the Fourth Circuit may be reversed and the decision of the District Court affirmed and that your petitioners may have such other and further relief in the premises as to this Court may seem proper.

JAMES R. FLEMING,

HOMER A. HOLT,

Attorneys for Fidelity Assurance Association, Debtor.

THOMAS C. TOWNSEND,

Attorney for Central Trust Company, Trustee for Fidelity Assurance Association.

JOHN V. RAY,

Of Counsel for Fidelity Assurance Association, Debtor.

HILLIS TOWNSEND,

JOHN T. KEENAN,

Of Counsel for Central Trust Company, Trustee for Fidelity Assurance Association.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A statement of the case has been given in the petition and, to avoid duplication, is not repeated.

Summary of Argument.

I.

Congress, by the Investment Company Act of 1940, has classified Fidelity as a corporation other than an insurance corporation.

II.

The Circuit Court of Appeals has decided an important question of Federal law arising in the administration of the Bankruptcy Act, and particularly Chapter X thereof, which has not been, but should be, settled by this Court; namely, what is an insurance corporation within the meaning of the Bankruptcy Act.

III.

The Circuit Court of Appeals has decided the Federal question of what is an insurance corporation within the Bankruptcy Act in a way that is probably in conflict with applicable decisions of this Court. There is no decision of this Court deciding what is an insurance corporation, or laying down the principles of classification within the meaning and purposes of the Bankruptcy Act, but in other situations and applications this Court has laid down the principle of classification by corporate activities. If this principle of classification be applicable under the Bankruptcy Act, then the decision of the Circuit Court of Appeals is in conflict therewith.

IV.

There is no decision of the Supreme Court of Appeals of West Virginia classifying Fidelity, or other corporations engaged in like activities, as or as not an insurance company, but it is believed that the statutes of West Virginia unmistakably classify Fidelity as a corporation other than an insurance corporation, and the Circuit Court of Appeals has classified Fidelity as an insurance corporation contrary to the plain West Virginia statutory classification.

V.

In deciding that Fidelity is an insurance corporation the Circuit Court of Appeals has laid down principles of classification which conflict with the principles of classification laid down by other circuit courts of appeals in considering what corporations, including insurance corporations, are excluded from the provisions of the Bankruptcy Act.

VI.

If the meaning of the decision of the Circuit Court of Appeals that it is unreasonable to expect that a plan of reorganization can be effected is based upon the apparent holding that there can be no reorganization within the meaning of Chapter X of the Bankruptcy Act unless it be the rehabilitation of Fidelity as a going concern, and we believe that is the proper interpretation of the opinion of the Circuit Court of Appeals, then the decision is in conflict with the decisions of other circuit courts of appeals.

VII.

An inquiry into what facts and circumstances lead to a conclusion that the interests of creditors will be best subserved by the prior State court proceedings presents a

Federal question for the determination of which principles have not been, but should be, settled by this Court.

ARGUMENT.

Except for specific references otherwise, we shall discuss Fidelity, as to both corporate powers and business activities, from the point of view of its business from 1912 to December 31, 1940, that being the period of its actively engaging in the business involved, confident that its character was not, in fact, changed by its efforts at extra judicial reorganization between December 31, 1940, and June 6, 1941.

I.

Congress Has Classified Companies Such as Fidelity as Face-amount. Certificate. Investment Companies Rather Than as Insurance Companies.

If the Congress has classified corporations of the type of Fidelity as companies other than insurance, rather than as insurance companies, then the judicial classification of Fidelity as an insurance company by the Circuit Court of Appeals is clearly erroneous.

Unquestionably, Congress has the power to classify corporations for the purpose of Federal legislation, and when Congress has made such classification, in the absence of constitutional objections, none of which is suggested by the record in this case, the courts should follow the classification made by the Congress. (*In re Supreme Lodge of Masons*, 286 F. 180, 183; *In re Wisconsin Co-operative Milk Pool*, 119 F. (2d) 999, 1002, Cert. Den. 314 U. S. 655.) *Kansas v. Hayes*, 62 F. (2d) 597, 599.

A reading of the Investment Company Act of 1940 (Aug. 22, 1940, Chap. 686, Title I, 15 U. S. C. A., 80a, 1-52), we believe, shows not only that Congress has classified

Fidelity as a face-amount certificate company under the Investment Company Act and as a corporation other than an insurance corporation, but that this Congressional classification was made for the purposes, among others, of the Bankruptcy Act (Aug. 22, 1940, Chapt. 686, Sec. 29 (a), (b); 11 U. S. C. A., 72 (a), 107 (f)).

Congress has defined a "face-amount certificate" as follows:

"(a) When used in this subchapter and sections 72 (a), last sentence, and 107 (f) of Title 11, unless the context otherwise requires—

"(15) 'Face-amount certificate' means any certificate, investment contract, or other security which represents an obligation on the part of its issuer to pay a stated or determinable sum or sums at a fixed or determinable date or dates more than twenty-four months after the date of issuance, in consideration of the payment of periodic installments of a stated or determinable amount (which security shall be known as a face-amount certificate of the 'installment type'); or any security which represents a similar obligation on the part of a face-amount certificate company, the consideration for which is the payment of a single lump sum (which security shall be known as a 'fully paid' face-amount certificate)."

15 U. S. C. A., § 80a-2 (a) (15).

Congress has defined an "investment company" as including the business of issuing face-amount certificates:

"(a) When used in this subchapter and sections 72(a), last sentence, and 107(f) of Title 11, 'investment company' means any issuer which—

"(2) is engaged or proposes to engage in the business of issuing face-amount certificates of the install-

ment type, or has been engaged in such business and has any such certificate outstanding; or

“ . . . ”

15 U. S. C. A. § 80a-3 (a) (2).

In fact, the “face-amount certificate company” is one of the three principal classes of investment companies:

“For the purposes of this subchapter and sections 72(a), last sentence, and 107(f) of Title 11, investment companies are divided into three principal classes, defined as follows:

“(1) ‘Face-amount certificate company’ means an investment company which is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or which has been engaged in such business and has any such certificate outstanding.

“ . . . ”

15 U. S. C. A. § 80a-4 (1).

Congress has gone further. The Investment Company Act of 1940 expressly amended certain sections of the Bankruptcy Act in a way to make specific application of the Bankruptcy Act to face-amount certificate companies. It prescribed a particular method for the selection of the trustee in bankruptcy for face-amount certificate companies:

“ . . . If the bankrupt is a face-amount certificate company, as defined in section 80a-4 of Title 15, the court alone shall make the appointment; but the court shall not make such appointment without first notifying the Securities and Exchange Commission and giving it an opportunity to be heard.”

Aug. 22, 1940, c. 686, Title I, § 29(b); 11 U. S. C. A., § 72a.

The Investment Company Act particularly amends the Bankruptcy Act with respect to deposits or transfers of securities by face-amount certificate companies (Aug. 22, 1940, c. 686, Title I, § 29(a); 11 U. S. C. A., § 107f (1) (a); (Appendix A), manifesting an unmistakable Congressional intent that face-amount certificate companies be within the provisions of the Bankruptcy Act.

In fact, counsel for the West Virginia respondents, in giving a summary of Federal legislation affecting Fidelity, say that Congress provided in § 29 of the Investment Company Act for "bankruptcy of face-amount certificate companies" (R. 162), we may add, anticipating the difficulties which such companies would experience when the Investment Company Act should become effective.

The Investment Company Act does not stop with these definitions of face-amount certificate companies but, for purposes of contrasting insurance companies with face-amount certificate companies and other investment companies and of exempting insurance companies from the provisions of the Investment Company Act and of bringing face-amount certificate companies within the provisions of the Investment Company Act and also within the provisions of the Bankruptcy Act, defines an insurance company as follows:

"(a) When used in this subchapter and sections 72 (a), last sentence, and 107 (f) of Title 11, unless the context otherwise requires—

.. . . .

"(17) 'Insurance company' means a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner or a similar official or agency of a State; or any receiver or similar

official or any liquidating agent for such a company, in his capacity as such."

15 U. S. C. A., § 80a-2 (a) (17).

Under this definition of an insurance company, even if the sending out by Fidelity of the riders to the Series B Contracts having the § 6 provisions were the making of insurance contracts as was concluded by the Circuit Court of Appeals, which we do not admit, yet, Fidelity would not be within the definition of an insurance company for the reason that, admittedly, the insurance features of the Series B Contracts were but incidental to the primary and predominant business of issuing face-amount certificate contracts.

The Investment Company Act (15 U. S. C. A., 80a-3 (c) (3)), excludes an insurance company from the definition of an investment company, but face-amount certificate companies not only are not so excluded but are expressly defined as investment companies and as one of the three principal divisions thereof (15 U. S. C. A. 80a 3(a) (2), 4 (1)).

Section 3 of the Investment Company Act (15 U. S. C. A., 80a-3 (c) (6)) shows that the issuing of face-amount certificates is one of the principal earmarks of an investment company.

In this particular case, Fidelity is not exempted from the provisions of the Investment Company Act or of the Bankruptcy Act by Section 6 of the Investment Company Act (15 U. S. C. A., 80a-6 (a) (2)) for the reason there was no proceeding pending in a court of the United States or of a State in which a receiver was appointed for Fidelity, prior to the effective date of said Investment Company Act, which was, as to face-amount certificate companies, January 1, 1941 (Aug. 22, 1940, c. 686, Title I, § 53, 15

U. S. C. A., § 80a-52). The State court proceedings were not instituted until April 11, 1941 (R. 12).

For the purposes of discussion of some of the points hereinafter, it is significant to observe that by the very definition of an insurance company in the Investment Company Act (15 U. S. C. A., 80a-2 (a) (17)), the classification of a corporation as an insurance company, is made dependent upon the company's "primary and predominant business activity", which, in order that the company be so classified, must be "the writing of insurance or the reinsuring of risks underwritten by insurance companies, * * *", thus, by clear implication, excluding as tests or principles of classification the mere charter powers, or the nature or source of the charter of the corporation, even though to be so classified the corporation must be "organized as an insurance company". We do not mean to suggest that these factors might not, in proper cases, have some significance.

We earnestly submit that Congress has classified Fidelity as a face-amount certificate investment company and has, for the purposes of the classification, including the purposes of bankruptcy, excluded Fidelity from classification as an insurance company; and that any judicial consideration of the classification of Fidelity, beyond reference to and analysis of the Investment Company Act of 1940, is quite afield the scope of proper judicial inquiry.

II.

A Federal Question Which Has Not Been, but Should Be, Settled by This Court.

In the administration of a Federal statute the meaning of the language used, in this case the meaning of the words "insurance corporation", whether the meaning be ascer-

tained by Congressional classification, by a Congressional intent that the classification be determined by State laws, or otherwise, presents a Federal question. So far as this case is concerned, we are confident that the Investment Company Act and the amendments made to the Bankruptcy Act thereby make the question rather academic. Yet, it is a Federal question which this Court has not settled, but, we believe, should settle.

Considering the variety of powers that are contained in the charters of the many corporations organized under the varying laws of the several States, the multiplicity of activities frequently engaged in by a single corporation, the differences in the laws of the several States relative to the issuance of corporate charters, together with the expanding field of Federal legislation, it is inevitable that questions of this general type will recur frequently. We believe that the principles of classification of corporations within the purposes of the Bankruptcy Act and especially the reorganization provisions thereof, Chapter X, should be settled by this Court.

This general question has arisen frequently in the circuit courts of appeals and there seems to be appreciable confusion in determining the principles by which corporations should be classified, and even more confusion in applying the principles selected to the facts of the several cases. Some of the circuit courts of appeals, including that of the Fourth Circuit in the case at bar, have disclaimed the applicability of the principles for the classification of corporations laid down by this Court in administering tax statutes.

These considerations suggest the desirability of clarifying this question, particularly as it arises under the Bankruptcy Act and under the Investment Company Act of 1940.

III.

Decision of Circuit Court of Appeals, Fourth Circuit, Probably in Conflict with Applicable Decisions of This Court.

If, in order that it may be said that the decision of a circuit court of appeals is in conflict with an applicable decision of this Court, it is necessary that the decision of this Court relate to the same laws and the same subject matter as were considered by the circuit court of appeals, then it cannot be said that, with respect to the classifying of Fidelity as an insurance or other company, the decision of the Circuit Court of Appeals is in conflict with any decision of this Court, since there is no such specific decision of this Court.

This Court has decided what is, and what is not, an insurance company under the tax statutes. (*Bowers v. Lawyers Mortgage Company*, 285 U. S. 182; *United States v. Home Title Insurance Company*, 285 U. S. 191.) The classification in these cases was made by this Court on the basis of the activities of the corporations involved. We have already noted that the definition of an insurance company in the Investment Company Act requires that the classification of the company as, or as not, an insurance company be determined by the primary and predominant business activities of the company; although it is also specifically required that, in order to be an insurance corporation, the corporation be chartered as such.

In the *Bowers* and *Home Title* cases, the corporations involved were incorporated under the insurance laws of New York. Based upon their respective activities, the corporation in the *Bowers* case was held not to be an insurance company, while the corporation in the *Home Title* case was held to be an insurance corporation. In the case at bar Fidelity did not even have insurance charter powers until its charter was amended December 31, 1940, in an effort to effect an extra judicial reorganization.

We fully appreciate that there are differences in the purposes and objectives of the various tax statutes and of the Bankruptcy Act and that it may plausibly be insisted, as has been done* (*In re Union Guarantee & Mortgage Company*, 75 F. (2d) 984, 985, Cert. Den. 296 U. S. 594), that the principles of the *Bowers* and *Home Title* cases have no applicability when the interpretation of the Bankruptcy Act is under consideration. We may inquire, however, whether there is any real basis for such distinction. The question arises in each instance in substantially the same way, the application of a Federal statute using the phrase "insurance corporation" but providing no specific definition of the term. There would seem to be no more reason for excluding non-insurance creditors of Fidelity from the benefits of the Bankruptcy Act, even though upon petition of Fidelity itself, merely because Fidelity may have had, for a short while, insurance charter powers which it exercised only slightly, or not at all, than it would be to exclude the government from collecting taxes on certain business activities carried on by a corporation just because the corporation happened to have other charter powers, not so taxed, or engaged in the taxable business activities *ultra vires*.

We, therefore, believe that the corporate activities afford a sound and applicable basis for classifying corporations in bankruptcy, as well as in tax matters, and that mere incidental activities should be no more controlling of major activities in bankruptcy than in taxation, and that the *Bowers* and *Home Title* cases establishing the principle of classification by corporate activities are applicable decisions of this Court and that the decision of the Circuit Court of Appeals, Fourth Circuit, is in conflict therewith.

Especially would these principles seem to be applicable in this case where the question is whether Fidelity is an investment company or an insurance company and by the

Investment Company Act, which seeks to make the distinction, the primary and predominant activities of the corporation are in the main made determinative, even though Fidelity may have had, for a short time, an insurance charter under which it did nothing except to try to effect an extra judicial reorganization. In enacting the Investment Company Act of 1940 definition of an insurance company, no doubt the Congress considered and adopted the principles of the decisions of the *Bowers* and *Home Title* cases. The definition adopted would so indicate.

IV.

Classification by State of West Virginia.

It is not questioned that from 1912 to December 31, 1940, Fidelity operated under the provisions of Article 9, Chapter 33 of the West Virginia Code (R. 364). Section 1 of said article (Appendix A) expressly provides:

“ * * * Provided, however, That this article shall not be construed as applying to persons, associations or corporations engaged in selling merchandise in installments, *insurance companies*, foreign or domestic, duly authorized to do business in this State, * * * ”

If it can be said that the State classification of Fidelity is that Fidelity is an insurance company, then, by the very express terms of the article, enacted for the supervision and regulation of annuity companies, annuity companies are excluded as insurance companies from the operations of the statute, rendering the article, for all practical purposes, nugatory and without subject matter upon which to operate.

Again, the West Virginia statutes under which the State court proceeding was instituted in West Virginia (Code 33-9-10, 33-2-45, Appendix A) provides that the insurance commissioner shall have the same authority in this respect

over annuity corporations as he has over insurance companies. If Fidelity were an insurance company, there would be no reason for the enactment of any statute to make specifically applicable to annuity corporations the statutory provisions already applicable to insurance companies. That activities of Fidelity were under the supervision of the insurance commissioner does not make Fidelity an insurance company (*Capital Endowment Company v. Kroeger*, C. C. A. 6, 1936, 86 F. (2d) 976. See also *In re Prudence*, 79 F. (2d) 77. Cert. Den. 296 U. S. 646.

In view of these statutes, how can it be said that the State of West Virginia has classified Fidelity as an insurance company? True, it is provided that life insurance companies may issue annuity contracts (West Virginia Code, 33-3-7; Appendix A), but that lacks much of saying that annuity corporations may issue life insurance or that annuity corporations are insurance companies. West Virginia has provided different statutes regulating life insurance (Chapter 33, Article 3) and annuity contracts (Chapter 33, Article 9). (Compare *Gamble v. Daniel*, C. C. A. 8, 1930, 39 F. (2d) 447.) Cert. Den. 282 U. S. 848.

We believe that the decision of the Circuit Court of Appeals is in conflict with the plain classification of Fidelity as a corporation other than an insurance company by the State of West Virginia.

V.

Conflict with Decisions of Other Circuit Courts of Appeal and Inconclusiveness of Decisions of the Circuit Courts of Appeal.

The problem of classifying corporations as within or without the provisions of the Bankruptcy Act has arisen frequently in the several circuit courts of appeal. With-

out questioning the conclusions reached in the many cases, other than that reached by the Circuit Court of Appeals in the case at bar, we assert that these decisions are replete with conflicts and inconsistencies in their efforts to settle the principles by which corporations for the purposes of bankruptcy are to be classified and in applying the selected principles to the facts of the several cases. In some cases conflicting principles have been applied even in the same decision. The decision of the Circuit Court of Appeals in the case at bar conflicts, in whole or in part, with decisions of other circuit courts of appeal.

Under the Bankruptcy Act of 1898, which provided that " . . . any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits . . . " was subject to bankruptcy, the business activities of the corporation were looked to and were determinative in deciding whether or not the corporation was subject to the Act. Since the amendments of 1910 and 1938, specifically exempting municipal, railroad, insurance and banking corporations, and building and loan associations, the business activities rule, as such, has been affirmed in some cases (i. e.: *In re Supreme Lodge of the Masons Annuity*, D. C. Ga., 1923, 286 Fed. 180; *In re Wisconsin Cooperative Milk Pool*, C. C. A. 7, 119 F. (2d) 999, Cert. Den. 314 U. S. 658), and the business activities have been leaned upon heavily, we believe the rule applied in fact, in other cases nominally predicating the decision upon the "charter power" or "State classification" rules, as noted hereafter.

Some decisions, noting that these exempted corporations were not defined by the Act, have taken the position that the purpose of the amendment was to eliminate the factual uncertainties incident to a determination of the principal business of a corporation participating in more than one business activity, and to make the exceptions specific of

certain corporations, which, in the absence of Congressional definition, should be selected according to the classifications given them by the States, noting also that the exempted corporations were generally regarded as "affected with a public interest" and regulated by the States; from which it was inferred that the Congress had determined to leave them for State administration as well as regulation. (Typical of these cases is: *La re Union Guarantee & Mortgage Company*, C. C. A. 2, 1935, 75 F. (2d) 984, 985, quoted from at length in the opinion of the Circuit Court of Appeals in the case at bar.)

This is a very plausible theory, not unsupported by some logic, and one which has received rather wide acceptance, at least in lip service, as a "State classification" rule, but one which has failed to eliminate many of the uncertainties attributable to the "corporate activities" rule, and one which we believe, in so far as it is based upon Congressional exclusion because of State supervision, certainly as to face-amount certificate companies, Congress has rejected by the enactment of the Investment Company Act of 1940.

In the State classification decisions sometimes a question arises as to whether the State classification is determined by the charter powers, the laws under which the charter was issued, or the character of the supervisory authority. Where the charter powers are harmonious with the general coverage of the laws under which they were issued and the supervision is by an official whose duties are well catalogued therewith, and the corporate activities are in keeping therewith, the State classification rule naturally works with precision; but, where a real question arises, most of the decisions have found it necessary to fall back upon the "activities" rule in fact, if not in name.

Detailed analysis and comparison of all of the pertinent decisions would unnecessarily extend this discussion. It

is believed that a brief analysis of a few of the decisions will demonstrate the unsettled status of the principles and their applications, as well as the conflict of the decision of the Circuit Court of Appeals in the case at bar with some of the other decisions.

In the Second Circuit, in the case, *In re Union Guarantee & Mortgage Company*, 1935, 75 F. (2d) 984, of the corporation involved, it was said: "It was organized under the Insurance Law of the State of New York * * * and its business was to make loans secured by mortgages on real property which it sold to its customers with a guaranty." Applying the State classification rule, it was held to be excluded from reorganization under Section 77B of the Bankruptcy Act, for the reason that its charter was issued under the insurance law.

In the same circuit, in the case, *In re Prudence Company*, 1935, 79 F. (2d) 77, of the corporation involved, actually engaged in the same business as the corporation involved in the *Union Guarantee & Mortgage Company* case, it was said: "The debtor was incorporated in 1919 under the article of the Banking Law (New York), relating to investment companies. * * * Its business has consisted in making mortgage loans on real estate and selling the mortgages to the public with its guaranty of payment." This corporation was held not to be a banking corporation and to be within the provisions of 77B. It was observed: "* * * it cannot be successfully contended that every corporation which may be formed under the New York Banking Law is a banking corporation * * *," pointing out that the Banking Law was entitled "An Act in relation to banking corporations * * * and corporations under the supervision of the banking department," and that under the various articles of the Banking Law may be formed "banks, trust companies, safe deposit companies,

and investment companies," so, with respect to Fidelity, and the conflict of the decision of the Circuit Court of Appeals, Fourth Circuit, in the case at bar with this decision, even if all of Chapter 33 of the West Virginia Code, entitled "Insurance and Annuity Contracts" were regarded as "insurance laws," and although insurance and annuity corporations are under the supervision of the Insurance Commissioner, it cannot be contended that every corporation which operates under said Chapter 33 is an insurance company with any greater success than it was contended in the *Prudence* case that every corporation operating under the Banking Law of New York was a banking corporation. In Chapter 33 of the West Virginia Code there are different articles dealing with different types of corporations, particularly insurance corporations on one hand and annuity corporations on the other, just as under the New York laws there were different articles dealing with different types of corporations, including banks, trust companies, safe deposit companies, and investment companies; and Article 9 of Chapter 33 of the Code of West Virginia is the article under which annuity companies, defined by Congress as face-amount certificate companies, have operated. But the *Prudence* case goes further, and, turning to activities, said the corporation was not a banking corporation because it never did obtain the power to receive deposits, the criterion of a banking corporation. Again, the corporation was held not to be an insurance company (79 F. (2d) 77, 80), although the guaranteeing of mortgages was recognized as contracts of insurance (*Bowers v. Lawyers' Mortgage Co.*, 285 U. S. 182, 189), because the corporation was not chartered under the Insurance Law and its guaranty of mortgages was "but incidental to its mortgage business," with which conflicts again the decision of the Circuit Court of Appeals, Fourth Circuit, in the case at bar, in which, if Fidelity made any

insurance contracts, which we do not admit, they were but incidental to the annuity contract business.

Thus, applying with reasonable consistency in legal principle the State classification test, the Circuit Court of Appeals, Second Circuit, has reached diametrically opposite conclusions with respect to two corporations engaged in what would seem to be almost identical business activities, holding one, Union Guarantee & Mortgage Company, to be excluded from the provisions of the Bankruptcy Act because its charter was issued under the Insurance Laws of New York, and holding the other Prudence Company, not to be so excluded because, although its charter was issued under the general Banking Law of New York, it was not issued under the particular article dealing with banks of deposit, and was, therefore, not a banking corporation within the purposes of the Bankruptcy Act according to such State classification.

In the case of *Empire Title and Guarantee Company v. United States*, 1939, 101 F. (2d) 69, the Circuit Court of Appeals for the Second Circuit reviews these two cases.

In the Fifth Circuit, in the case of *Clemons v. Liberty Savings & Real Estate Corporation*, 61 F. (2d) 448, the corporation was chartered by the superior court after the petition for incorporation had been amended by making the name "Liberty Savings & Real Estate Corporation" rather than "Liberty Banking & Real Estate Corporation," and granted, in addition to the real estate powers, among others, the powers " . . . ; to buy, sell, and deal in stocks, bonds, promissory notes, and all kinds of choses in action; to advance or lend money to its stockholders or other persons, and to adopt a system of loans, advances, terms, and payments in installments in like manner, as to its interest charges and computations as may be done by building and loan associations under the laws of Georgia; to conduct

a savings department for its members and other persons with the right to receive deposits not subject to check, and to pay interest thereon." The questions were whether the corporation was a banking corporation or building and loan association, or neither of them, under the Bankruptcy Act. Charters of banks could be issued only by the Secretary of State, while charters for building and loan associations could be issued by the Superior Court. The court observed: "the status of a corporation is fixed by its charter," and held that the corporation was not a banking corporation, observing, with respect to evidence that the depositors were permitted to make withdrawals from time to time, "• • • If it occasionally engaged in banking transactions, those acts were ultra vires and could not operate to make it a bank within the meaning of the Bankruptcy Law; • • •" The source of the charter appears to have been accepted as the test. Were this test applied consistently, the corporation might have been a building and loan association, but the court, in disposing of this question, turned to the activities and observed: "There is no evidence whatever in the record that would indicate that appellee did the business usually conducted by a building and loan association."

See also *Republic Underwriters v. Ford*, 1938, 100 F. (2d) 511, also from the Fifth Circuit.

In the Sixth Circuit, in the case of *Capital Endowment Company v. Kroeger*, 1936, 86 F. (2d) 976, the debtor was incorporated under the general provisions of the Ohio corporations statute and authorized to engage in business as a bond investment company, originally subject to the supervision of the deputy inspector of building and loan associations and, later, by statutory revision, to the supervision of the superintendent of insurance. The debtor claimed to have abandoned the bond investment business before the

supervision was transferred to the superintendent of insurance. The superintendent of insurance was empowered by statute to take over and liquidate domestic building and loan associations and prepared to take over two such associations, the assets of which were acquired by the debtor before the insurance commissioner could take effective steps therefor. Actions were instituted to avoid the transfers of the building and loan assets to the debtor. Disposing of the contention that debtor was an insurance corporation, the court, citing *In re Prudence, supra*, held:

“ * * * But the present debtor is not an insurance corporation. It was organized under the general incorporation law of Ohio, and while it later qualified as a bond investment company, it is not denied that it abandoned this field prior to the filing of its petition. The mere fact that bond investment companies were placed under the supervision of the Superintendent of Insurance could neither enlarge their powers nor alter their business * * * ” 86 F. (2d) 976, 979.

It was also held that the debtor was not a building and loan association since it had been deprived of the building and loan assets. No more, in the case at bar, should Fidelity be considered to be an insurance company merely because it is subject to the supervision of the West Virginia State Auditor, ex officio Insurance Commissioner.

For the Sixth Circuit, see also *In re Roumanian Workers Association of America*, 1940, 108 F. (2d) 782, where the activities rule seems clearly to have been applied in holding that the debtor, chartered as a non-profit corporation, was a “moneyed, business or commercial corporation.”

In the Eighth Circuit, in the case of *Gamble v. Daniel*, 1930, 39 F. (2d) 447, Cert. Den. 282 U. S. 848, the corporation involved, Peters Trust Company, was incorporated under the laws of Nebraska. It was held that the company was a trust company under Article 19 of Title V of the

Nebraska Laws, rather than a banking company under Article 17 of said title, and not a banking corporation within the Bankruptcy Act, " * * * although section 8068 gives trust companies most, if not all, of the powers usually exercised by a bank or enumerated in sections 7983 and 7985 of article 17, *except receiving deposits*, section 8068 forbids any trust company 'to conduct the business of banking, as defined in Title V, Article XVII' * * * and section 7985 makes it unlawful (with exceptions not here material) to transact a banking business except by those complying with article 17."

It was contended that the trust company was a banking corporation if it were authorized to engage in any one of the classes of activities within the statutory definition of "business of banking" (39 F. (2d) 447, 451), but such contention was rejected. The decision of the Circuit Court of Appeals, Fourth Circuit, in the case at bar, if not in this respect in conflict with this decision, would have likewise rejected the contention that Fidelity was an insurance company because it sold annuity contracts, which is one of the powers of life insurance companies under the West Virginia statute (West Virginia Code 33-3-7; Appendix A).

Of interest in illustrating decisions in which no real differences between powers and activities were presented are: *Security B. & L. Association v. Spurlock*, C. C. A. 9, 1933, 65 F. (2d) 768, Cert. Den. 290 U. S. 678, and *State of Kansas v. Hayes*, C. C. A. 10, 1932, 62 F. (2d) 597.

We believe that the decision of the Circuit Court of Appeals, Fourth Circuit, in the case at bar, conflicts in principle with several of these cases. At least it can be said with assurance that there are many inconsistencies between the case at bar and these cases from other circuits;

there are inconsistencies between the decisions of some of the other circuits and even within the same decisions. It would seem to be highly desirable that this Court resolve these inconsistencies by settling the correct principles of classification of corporations for purposes of administering the Bankruptcy Act, and particularly Chapter X thereof, including a consideration of Congressional classification of face-amount certificate companies by the Investment Company Act of 1940.

VI.

Does the record show that it is unreasonable to expect that a plan of reorganization can be effected?

There is in the record much testimony of qualified witnesses that in their opinions Fidelity can be reorganized (R. 265-291). The respondent Sims, West Virginia State Auditor and ex officio Insurance Commissioner, and the plaintiff in the West Virginia State court proceedings pursuant to which the respondents Smith and Thomas were appointed State Receivers, who had for more than eight years supervised the activities of Fidelity, thought that there could be reorganization (R. 272-273) and brought the proceeding in the State court for purposes of rehabilitation (R. 252, 253). An offer was made by Pell, Limited, a financial concern, for the common stock of Fidel, the New York subsidiary of Fidelity, and interest was expressed in investing additional capital for the purpose of reorganizing Fidelity (R. 291-292). Even now; counsel for the respondents are endeavoring to act in concert voluntarily for the sale of the assets of Fidelity (R. 409-413), recognizing in Fidelity's assets a value which would not survive forced and divergent liquidations.

Such reorganization in the State court could only be by voluntary reorganization since West Virginia has no appli-

cable reorganization statute and does not have the territorial jurisdiction to reach all of the assets of Fidelity.

Fidelity's aggregate assets amounted to, in round figures, \$21,100,000.00, or approximately ninety per cent (90%) of its aggregate liabilities, \$23,476,000.00 (R. 366). The reserve funds of Income Reserve Contracts Series A, B, C and D are solvent (R. 252). From 1934 until the end of 1940 the Series B Contracts represented a very large part of Fidelity's entire business (R. 368-369).

This factual observation suggests an inquiry into what dispositions or administrations of Fidelity may be within the scope of reorganization wit' in the meaning of the term as used in Chapter X of the Bankruptcy Act.

We believe that an analysis of the opinion of the Circuit Court of Appeals, Fourth Circuit, in this case irresistibly leads to the conclusion that when the Circuit Court of Appeals considered that Fidelity could not be reorganized, the concept of reorganization entertained by the Circuit Court of Appeals was that Fidelity must be rehabilitated as a going concern, carrying on its business in substantially the same manner as that by which it had previously done business.

This concept of reorganization of the Circuit Court of Appeals, Fourth Circuit, as reflected by its opinion in the case at bar, is clearly not in harmony with the concepts entertained by other circuit courts of appeal. Rehabilitation as a going concern is not required. *In re Central Funding Company*, C. C. A. 2, 1935, 75 F. (2d) 256, 259; *In re Mortgage Securities Corporation*, C. C. A. 2, 1935, 75 F. (2d) 261; *Capital Endowment Company v. Kroeger*, C. C. A. 6, 1936, 86 F. (2d) 976, 979; *Continental Insurance Company v. Louisiana Oil Refining Corporation*, C. C. A. 5, 1937, 89 F. (2d) 333, 336; *R. L. Witters Associates v. Eb-sary Gypsum Company*, C. C. A. 5, 1938, 93 F. (2d) 746,

48; *In re Porto Rican American Tobacco Company*, C. C. A. 2, 1940, 112 F. (2d) 655, 657.

It is not believed that this case, long drawn out in the consideration of basic jurisdictional questions, had reached the stage of critical examination of plans of reorganization. *Continental Illinois Bank & Trust Company v. C. R. I. & P. R. Co.*, 294 U. S. 648, 685; *R. L. Witters v. Ebsary Gypsum Company*, 93 F. (2d) 746, 748; *In re Julius Roehrs Company*, C. C. A. 3, 1940, 115 F. (2d) 723, 724.

The trustee should have an opportunity to explore the possibilities of reorganization. *In re Marine Harbor Properties*, C. C. A. 2, 1942, 125 F. (2d) 296, 298, Certiorari granted 86 L. Ed. (Adv.) 729. It is obvious that the extended litigation relating to the basic jurisdiction of the reorganization court in the case at bar has not afforded a foundation upon which could be based any very practicable opportunity for the trustee to make any such exploration thus far.

Can it be said that it is unreasonable to expect that some insurance or investment company can be found to take over or buy the assets of Fidelity under a contract for the benefit of the Fidelity contract holders, to issue them investment certificates or insurance policies, of one or more kinds, of greater value than the dividends to such contract holders through the liquidation of Fidelity would buy? Such an arrangement would afford the contract holders the benefit, in whole or in part, of the original selling costs of insurance policies or investment certificates which are, comparatively speaking, high and which will have been lost to the contract holders of Fidelity unless some plan of reorganization is effected. The purchaser of the assets might give the contract holders an option of taking in cash their determined equities in liquidation or of accepting an insurance policy or an investment contract. A beneficial merger might be worked out with some other investment company or an insurance company. As suggested by the respondent

West Virginia State Auditor (R. 273), the organization of a mutual company to administer Fidelity's assets for the benefit of the contract holders is not beyond the realm of consideration. It should not be unreasonable to expect that at least the solvent funds or series of the Fidelity contracts might be reorganized and the solvent funds or series constitute a very material part of the assets and business of Fidelity (R. 368). These observations are something more than a mere suggestion of remote possibilities. They are suggestions supported by the record and thoughts which should not be relegated to the realm of mere possibilities as distinguished from probabilities until there has been some opportunity to transform them into realities.

But, as a last resort, even a slow, orderly, beneficial liquidation, which we do not believe to be inevitable in this case, is within the scope of reorganization. *In re Central Funding Corporation, supra*; *In re Mortgage Securities Corporation, supra*; *R. L. Witters Associates v. Ebsary Gypsum Company, supra*; *In re Porto Rican American Tobacco Company, supra*; Bankruptcy Act, Chapter X, Sec. 216 (10); 11 U. S. C. A. 616 (10).

The District Court had much upon which to base its conclusion that it was not unreasonable to expect that a plan of reorganization could be effected, and its finding in this respect should not have been reversed by the Circuit Court of Appeals. *In re Mount Forest Fur Farms of America*, C. C. A. 6, 1939, 103 F. (2d) 69, 71, Cert. Den., 308 U. S. 583; *In re Equity Company*, 115 F. (2d) 570, 572-3.

VII.

Are the interests of creditors best subserved by the prior State proceedings?

There is not involved here a single proceeding in any State court to consider the affairs of Fidelity, but already twelve separate State proceedings have been instituted

and there is the prospect of not less than three more such proceedings, should this proceeding be dismissed.

It does not appear that in any of the States in which proceedings have been instituted such proceedings have been instituted under reorganization statutes, if there are reorganization statutes in such States. The proceedings in the States in which they have already been instituted would, unless a voluntary reorganization be effected, liquidate the deposits held in the respective States and distribute the proceeds without regard to any relationship between the particular contracts held by the residents of such States to Fidelity's various funds, supporting the various series of contracts, invested by Fidelity in the assets held by the several State authorities. The prevalent theory of the States participating in this case is that the State deposits, except in West Virginia, are for the primary protection of the holders of the contracts sold in the respective States. This theory may, or may not, be sound. It should be judicially determined by a court having jurisdiction of all of the assets and of the persons interested before there is any distribution.

If there be some twelve or fifteen separate State liquidations, many creditors may be deprived of assets in which they are entitled to participate, even before their legal rights to participation are adjudicated. The adjudication of such rights may be in vain if the assets of Fidelity be administered by so many distinct and separate proceedings in as many separate States.

There is a substantial surplus of assets held in Wisconsin over contract liabilities to residents of that State, and small surpluses in Delaware, Iowa, Missouri, and Alabama (R. 366). The assets held in West Virginia exceed by some eight million dollars the liabilities to the residents of West Virginia. (In the table on page 366 of the Record the liabilities attributable to West Virginia include the lia-

bilities to contract holders in all States which require no deposits.) The deposits in West Virginia, pursuant to the West Virginia law, have apparently been made for the benefit of the holders of contracts, wherever they are and wherever they bought their contracts to the extent that the State in which the contract was sold did not require any deposit or required insufficient deposits.

Whether or not, if there should be liquidation, the assets should be distributed according to the States in which they are held and to the contract holders residing therein, or according to the contract series funds for which Fidelity owned and held these assets, will be a real question which can be effectively determined only while the *res* is undistributed.

It may be, by way of illustration, that the interests of the Wisconsin creditors may be best subserved by a one hundred per cent liquidation in Wisconsin. What about the creditors in other States who own contracts of the same series and may be entitled to participate in the same assets from the standpoint of Fidelity's obligations? Were the deposits required in Wisconsin for the purpose of assuring the solvency of Fidelity or for the benefit only of the contract holders resident in Wisconsin? The same inquiry may be made with respect to the other States.

Can it be said that the interests of all the creditors are best subserved by any such program of liquidation by separate States? We believe, rather, that the very purpose of the Investment Company Act and of the amendments thereof to the Bankruptcy Act, was to avoid any such confusion and futility. In order to know that they are availing themselves of all possible remedies for the protection of their interests, is it to the best interests of the creditors of Fidelity that they be required to file claims in the courts of many States? The amounts of the claims of the several creditors of Fidelity are, for the most part, quite small.

We are not to answer or resolve these questions here but they are suggestions demonstrating the necessity of withholding any distribution until they are settled.

The Circuit Court of Appeals seemed to be of opinion that the interests of the creditors would be best subserved because many questions of State law will likely arise and may be better determined by the State courts. But questions under the laws of many other States also will arise in the courts of the several States. It would seem that the courts of one State would be in no better position to determine the laws of other States than is a Federal Court to determine the laws of the several States. Federal Courts have always been required to consider State laws and there is no reason to believe that the United States District Court for the Southern District of West Virginia will not respect the laws of the several States involved when they become of importance in this proceeding.

The Circuit Court of Appeals, in concluding that the interests of creditors would be best subserved in the prior State court proceedings, also grounded its opinion upon the philosophy that " . . . Congress in excepting from the Bankruptcy Act those corporations, such as insurance, railroad and banking corporations, whose business during their active life and whose liquidation in case of insolvency are strictly regulated by State law. . . . " (R. 386) manifested an intent to abandon such corporations, so to speak, because of the allegedly conceded superiority of State supervision in these respects. If such ever were the Congressional policy, and it may have been at some earlier day, that Congressional policy was most certainly changed, in so far as face-amount certificate companies are concerned, by the enactment of the Investment Company Act of 1940 and the amendments thereof to the Bankruptcy Act.

The foregoing thoughts are expressed to suggest an inquiry of what are the considerations for determining when the prior State proceedings best subserve the interests of the creditors. This is an important question, and a Federal question since it arises under a Federal statute, Chapter X of the Bankruptcy Act, and one which this Court has not yet settled. It is presented by two other cases now pending before this Court, *In re Marine Harbor Properties*, C. C. A. 2, 1942, 125 F. (2d) 296, 298, Certiorari granted 86 L. Ed. (Adv.) 729, and *In re Paloma Estates*, C. C. A. 2, 1942, 126 F. (2d) 72, petition for certiorari filed. It is a question which should be settled by this Court and, since in the *Marine Harbor* and *Paloma* cases properties in more than one State are not involved, it is believed that the disposition of those cases will not necessarily determine the principles for consideration of far-flung activities within the territorial jurisdictions of several States, such as is presented by the case at bar. In these circumstances, the observations of United States District Judge Bryant in the *National Surety Company* case with reference to the obvious superior effectiveness of one Federal Court's having full jurisdiction of the subject matter, when compared to diverse actions in different States, is convincing:

"It is with regret that I refuse to take jurisdiction. I say this because it is apparent that future administration could be more readily carried on under one control than under the limited jurisdiction of several state courts. It seems almost a travesty to have to deny to this company the benefits of sections 77A and 77B of the Bankruptcy Act while its principal subsidiary is being administered thereunder. However, to hold differently would be the taking of powers that Congress did not deem it wise to give." 7 Fed. Supp. 959, 961.

The conditions and considerations in the case at bar are not greatly different from those involved in the *National Surety Company* case, except that in the case at bar Congress has given the powers which were so desired to be exercised by the court in the *National Surety Company* case.

The record does not indicate that the safeguards considered by Judge Frank in his dissenting opinion in the *Marine Harbor Properties* case (125 F. (2d) 296) will be afforded by the State court proceedings considered in the case at bar. Can it be said that the interests of creditors are best subserved in the prior proceedings in the State courts in the absence of such safeguards or their reasonable equivalents.

Unless all hope for any reorganization is actually futile, and we do not believe that it is, if a reorganization, in whole or in part, or even by slow, orderly, beneficial, complete liquidation, which we do not believe to be inevitable, is for the benefit of the creditors, and we believe it is, it would seem that this interest of the creditors not only can best be subserved by the proceeding in the United States District Court for the Southern District of West Virginia, having jurisdiction of the entire subject matter, but that it can be secured only in that and in no other court, of all the courts in which proceedings have thus far been instituted with respect to Fidelity.

The Conclusion of the District Court on this consideration of good faith was not without much reason both in fact and logic, and should not have been reversed by the Circuit Court of Appeals.

-Conclusion.

It is respectfully represented that this is a case in which this Court, in its sound judicial discretion, may appropriately grant the writ of certiorari as prayed, and that

the petition and the brief in support thereof present special and important reasons therefor.

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APPENDIX A.

Federal Statutes.

11 U. S. C. A. 506, Section 106(3) of Bankruptcy Act:

(a) Any person, except a municipal, railroad, insurance or banking corporation or a building and loan association, shall be entitled to the benefits of this Act as a voluntary bankrupt.

(b) Any natural person, except a wage earner or farmer, and any moneyed, business, or commercial corporation, except a building and loan association, a municipal, railroad, insurance, or banking corporation, owing debts to the amount of \$1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial and shall be subject to the provisions and entitled to the benefits of this Act. . . .

11 U. S. C. A. 506, Section 106(3) of Bankruptcy Act:

For the purposes of this chapter, unless inconsistent with the context—

(3) "corporations" shall mean a corporation, as defined in this Act, which could be adjudged a bankrupt under this Act, and any railroad corporation excepting a railroad corporation authorized to file a petition under Section 77 of this Act.

11 U. S. C. A. 544, Section 144 of Bankruptcy Act:

If an answer filed by any creditor, indenture trustee, or stockholder shall controvert any of the material allegations of the petition, the judge shall, as soon as may be, determine, without the intervention of a jury, the issues presented by the pleadings and enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith and that the material allegations are sustained by the proofs, or dismissing it if not so satisfied.

11 U. S. C. A. 546, Section 146 of Bankruptcy Act:

Without limiting the generality of the meaning of the term "good faith," a petition shall not be deemed filed in good faith if—

- (1) • • • •
- (2) • • • •

(3) it is unreasonable to expect that a plan of reorganization can be effected; or

(4) a prior proceeding is pending in any court and it appears that the interests of creditors and stockholders would be best subserved in such prior proceeding.

11 U. S. C. A. 616(10), Section 216(10) of Bankruptcy Act:

A plan of reorganization under this chapter—(10) shall provide adequate means for the execution of the plan, which may include: the retention by the debtor of all or any part of its property; the sale or transfer of all or any part of its property to one or more other corporations theretofore organized or thereafter to be organized; the merger or consolidation of the debtor with one or more other corporations; the sale of all or any part of its property, either subject to or free from any lien, at not less than a fair upset price and the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein; the satisfaction or modification of liens; the cancelation or modification of indentures or of other similar instruments; the curing or waiver of defaults; the extension of maturity dates and changes in interest rates and other terms of outstanding securities; the amendment of the charter of the debtor; the issuance of securities of the debtor or such other corporations for cash, for property, in exchange for existing securities, in satisfaction of claims or stock or for other appropriate purposes.

11 U. S. C. A. 107(f):

(1) For the purposes of, and exclusively applicable to, this subdivision (f): (a) "debtor" shall mean a face-

amount certificate company as defined in section 80a-4 of Title 15; (b) "face-amount certificate" shall mean a face-amount certificate as defined in section 80a-2 of Title 15; (c) "depository" is a person or State agency with whom securities or other property of a debtor is deposited or to whom property of a debtor is transferred, in trust or otherwise, pursuant to the requirements of a State law or an agreement by the debtor providing for the distribution of such property or its proceeds to creditors or security holders of the debtor in the event of the insolvency of the debtor, or under other specified circumstances; (d) "deposit creditor" is a creditor who, under the provisions of a State law or agreement providing for a deposit with or transfer to a depository, has rights as to the securities or property so deposited or transferred which exceed the rights of a general creditor; and (e) "State agency" is an official or agency of a State designated to act as depository or to distribute property or the proceeds of property held by a depository.

(2) Every deposit or transfer of securities or other property made by or on behalf of a debtor with or to any depository for the benefit or protection of or to secure the holder of any security sold by or on behalf of the debtor on or after January 1, 1941, shall be voidable as against the trustee of such debtor if the property of the estate is insufficient for the full payment and discharge of all claims on account of all face-amount certificates sold by or on behalf of the debtor, and such deposit or transfer and every lien created thereby shall thereupon be avoided by the trustee subject to the provisions of paragraph 3 of this subdivision (f).

(3) In the event any deposit or transfer described in paragraph 2 of this subdivision (f) shall be avoided the trustee shall segregate the property received by the trustee from the depository and charge the same with the costs and expenses of maintenance and liquidation and distribute the net proceeds thereof to the creditors who would have been entitled thereto under the provisions of the law or agreement providing for the deposit or transfer of the property, and each such creditor shall thereafter be entitled to divi-

dends from the estate only after all creditors of the same rank shall have received the same percentage.

(4) The court shall have summary jurisdiction of any proceedings to hear and determine the rights of any parties under this subdivision-(f) and to hear and determine the sufficiency of the property of the estate for the full payment and discharge of all claims on account of all face-amount certificates sold by or on behalf of the debtor. Due notice of any hearing in such proceedings shall be given to every depository and State agency which is a party in interest.

(5) Where the provisions of subsection (c) of section 28 are not applicable, the provisions of this section will not apply.

15 U. S. C. A. 80a-3 (c) (3) and (6). Notwithstanding subsections (a) and (b), none of the following persons is an investment company within the meaning of this subchapter and sections 72 (a), last sentence, and 107 (f) of Title 11:

(3) Any bank or insurance company; any savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, or any receiver, conservator, liquidator, liquidating agent, or similar official or person thereof or therefor; . . .

(6) Any person who is not engaged in the business of issuing face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: (A) Purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services; (B) making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services; and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate.

State Statutes.

West Virginia Code, Ch. 33, Art. 9, Sec. 1:

(1) License from Insurance Commissioner Prerequisite to Engaging in Business.—No person, association or corporation shall engage in the business of soliciting or receiving deposits or payments on any annuity contract or certificate or annuity bond in fixed and stipulated installments, within this State, without first having obtained from the insurance commissioner a license to do business in this State: Provided, however, That this article shall not be construed as applying to persons, associations or corporations engaged in selling merchandise in installments, insurance companies, foreign or domestic, duly authorized to do business in this State, building and loan associations, national banks and banking institutions organized and authorized to do business under the laws of this State, fraternal insurance societies, or surety companies doing business under the laws of this State. Such license shall be issued for one year, or the fractional part of a year, and for issuing the same a fee of ten dollars shall be charged; and the provisions of section twelve, article two of this chapter shall apply to such license.

West Virginia Code, Ch. 33, Art. 9, Sec. 2:

(2) License Prerequisite to Negotiating Contracts.—No person, association or corporation shall sell or offer for sale or deliver within this State any contract, certificate or bond of any person, association or corporation required by this article to obtain a license from the insurance commissioner to transact business in this State until such license has been issued by said insurance commissioner.

West Virginia Code, Ch. 33, Art. 9, Sec. 3:

(3) Deposits to be Made with the Treasurer.—Before a license to transact business in this State shall be issued by the insurance commissioner to any person, association, or corporation within the purview of section one of this article, the insurance commissioner shall require the

applicant to deposit with the state treasurer (in accordance with article five, chapter twelve of this code), in trust, for the benefit of its contract holders, bonds of the state of West Virginia, or such other bonds, and securities including bonds issued by the West Virginia bridge commission as may be approved by said insurance commissioner, or both, to the aggregate amount of one hundred thousand dollars, and, in addition to such deposit, such person, association or corporation shall maintain at all times a deposit with the state treasurer of bonds and securities approved by the insurance commissioner to an amount equal to the total amount which such person, association or corporation may be liable to pay in cash to the holders of all contracts under the terms thereof at the time of the deposit: Provided, That when, by the laws of any other state, any such person, association or corporation shall have been required to make and shall have made such deposit in such state, equal or greater in amount for the benefit of contract holders in such state, upon the filing of a certificate to such effect from the proper officer in such state with the insurance commissioner of this State, such person, association or corporation shall not be required to make such deposit with the treasurer of this State for the benefit of its contract holders in such other state; and when the laws of any other state require such deposit less in amount, such person, association or corporation shall file a certificate from the proper officer in such state with the insurance commissioner of this state showing the amount of the deposit made, and shall deposit with the treasurer of this state an amount which, together with the deposit made in such other state, shall make up the total amount required by this state to be deposited by such person, association or corporation, and such contract holders in such other state shall not be entitled to the benefit of the securities deposited with the treasurer of this State under this article, except so much of such deposit as may be made to complete the total amount required by this article where the law of any other state requires a lesser amount.

The insurance commissioner may require an independent appraisal, at the expense of the company, of any property

on which it holds a mortgage or trust deed or any bond or other investment offered by such company for the purpose of complying with the deposit provisions of this article.

West Virginia Code, Ch. 33, Art. 9, Sec. 5:

(5) **Revocation of License on Failure to Make Additional Deposits or Insufficiency of Assets.**—On the failure of such person, association or corporation to deposit such additional bonds and securities with the state treasurer when so required by the insurance commissioner, the license to do business in this State shall be revoked by the insurance commissioner. Whenever the insurance commissioner, upon an examination of the affairs of any such person, association or corporation, finds that the liabilities of such person, association or corporation exceed the assets thereof, the insurance commissioner shall suspend the license of such person, association or corporation until he is satisfied that the assets of such person, association or corporation are increased to exceed said liabilities.

West Virginia Code, Ch. 33, Art. 9, Sec. 10:

(10) **Authority of Insurance Commissioner; Control of Deposit Where License Revoked.**—The insurance commissioner shall have the same authority over every person, association, or corporation engaged in selling annuity contracts, certificates, or bonds, as over insurance companies, and if in his opinion the assets are impaired or such person, association or corporation is not complying with the law, said commissioner shall have authority to revoke the license of such person, association, or corporation to do business in this State, and, if such license is so revoked, the deposit or a sufficient amount of same, shall remain under the authority and control of the insurance commissioner until the total liability of all the contracts, certificates or annuity bonds or contracts issued by such person, association or corporation of this State is redeemed or settled.

West Virginia Code, Ch. 33, Art. 2, Sec. 5:

(5) **Issuance of License by Insurance Commissioner.**—Upon receiving such certified copy and statement, the in-

insurance commissioner may examine such company or association, and if he finds that it has complied with the terms of its charter or articles of association and the laws of this State, and with all the provisions in other sections of this chapter prescribing conditions precedent to the issuance of a license, or certificate of authority, and is satisfied that it is solvent (or if chartered or organized under the laws of any foreign country, is solvent in the United States), he may issue to it a license, or certificate of authority, stating such facts and authorizing it to issue policies, make contracts of insurance, and transact business in this State.

West Virginia Code, Ch. 33, Art. 2, Sec. 12:

(12) Time Licenses Shall Continue in Force.—All licenses, or certificates of authority issued by the insurance commissioner to insurance companies or associations, or agents, solicitors or brokers, shall continue in force until the first day of April next following their issuance, unless the same be sooner revoked.

West Virginia Code, Ch. 33, Art. 2, Sec. 45:

(45) Proceedings in Circuit Court of Kanawha County against Insolvent Company.—Whenever any company under the supervision and regulation of the insurance commissioner shall become insolvent or shall be in such financial condition as not to be able to pay its creditors in this State, the commissioner of insurance may file a bill in the circuit court of Kanawha county for the administering of the assets of such company as an insolvent, and for the purpose of taking possession of its property in this State and the distribution of its assets among those entitled thereto according to their respective right.

West Virginia Code, Ch. 33, Art. 3, Sec. 7:

(7) Annuities May Be Issued by Life Companies.—Life insurance companies chartered by and doing business in this State, and empowered to make contracts contingent upon life, may grant and issue annuities, either in connection with or separate from contracts of insurance based

upon life risks, and all such annuities heretofore issued by such companies shall be valid.

Ch. 46 of Acts of 1941:

(1) **Definitions.**—For the purposes of this article the term “face-amount certificate” shall mean any certificate, investment contract, or other security which represents an obligation on the part of its issuer to pay a stated or determinable sum or sums at a fixed or determinable date or dates more than twenty-four months after the date of issuance in consideration of the payment of periodic installments of a stated or determinable amount; or any security which represents a similar obligation on the part of its issuer, the consideration for which is the payment of a single lump sum.

All other terms used herein shall have their respective meanings, as provided in section two, article one of this chapter.

(2) **When Certificates Exempt from Registration.**—Face-amount certificates issued by a person licensed and supervised by the insurance commissioner of this state shall be exempt from registration under the provisions of this article.

(3) **Restriction on Sale.**—No face-amount certificates, except those exempt under the provisions of section two hereof, shall be sold within this state unless such face-amount securities shall have been registered as hereinafter provided.

(4) **Registration of Certificates.**—Face-amount certificates shall be registered hereunder by the filing of an application with the commissioner by the issuer or by any dealer properly registered under the provisions of section twelve, article one of this chapter: Provided, That the issuer of such certificates is registered under the provisions of an act of Congress entitled “Investment Company Act of 1940.” Such application is to be in the form prescribed by the commissioner. With each such application there shall be filed a certified copy of the registration statement

which was filed by the issuer of such certificates with the securities and exchange commission pursuant to the provisions of section-eight of the said "Investment Company Act of 1940."

The commissioner may require that the applicant file with him such additional data and information respecting the issuer as he shall deem necessary and pertinent to registration hereunder.

The commissioner shall have power and authority to place such conditions, limitations and restrictions on any registration as may be necessary to carry out the purposes of this article.

(5) Fees for Registration.—At the time of filing the application mentioned in section four of this article, the applicant shall pay to the commissioner a fee of one-twentieth of one per cent of the aggregate face-amount of the certificates to be sold in this state for which the applicant is seeking registration, but in no case shall such fee be less than twenty-five dollars, nor more than three hundred dollars.

(6) Expiration of Registration; Reregistration.—Every registration under this article shall expire on the thirtieth day of June in each year. New registrations for the succeeding year shall be issued upon written application, the applicant furnishing the commissioner, upon request, information as hereinbefore provided, and paying the commissioner a fee on the basis specified in section five of this article on the aggregate face-amount of the certificates to be sold in this state within the year to be authorized by registration. Applications for renewal registration must be made not less than thirty days before the first day of the ensuing registration year, otherwise they shall be treated as original application.

(7) Non resident Issuer to File with Application for Registration Written Appointment of State Auditor as Attorney in Fact; Service and Acceptance of Process.—When any issuer of face-amount certificates shall not be domiciled in this state, he shall file with every application for registration hereunder (whether such application be made by the issuer in person or by or through a registered dealer)

his irrevocable written appointment of the state auditor, or his successor in office, to be his true and lawful attorney in fact, who may accept or upon whom may be served, any lawful process or pleading in any action or proceeding against him in any court of record in this state, and such filing shall constitute his consent that any such process or pleading against him, which is properly served upon the state auditor or is accepted by the state auditor, shall be of the same legal force and validity as process or pleading duly served upon said issuer in this state. In case any process or pleading is served upon the state auditor, or accepted by him, such service shall be made in duplicate, one copy of which shall be filed in the office of the state auditor and the other immediately forwarded by registered mail to the principal office of the issuer against whom such process or pleading is directed.

(8) Sales to Be Made Only by Registered Dealers.—Face-amount certificates shall be offered for sale and sold in this state only by dealers and salesmen registered with the commissioner under the provisions of section twelve, article one of this chapter.

(9) Violations; Penalties.—Any person subject to the provisions of this article, who shall sell or offer for sale any face-amount certificates within this state without complying with the provisions of this article, or who continues to sell or offer for sale any such certificates after his registration has expired, or has been revoked or suspended by the commissioner, or who shall otherwise neglect or refuse to comply with any of the provisions of this article, shall be guilty of a felony, and upon conviction thereof, shall be punished by a fine of not more than five thousand dollars, or by imprisonment in the penitentiary for not more than five years, or by both such fine and imprisonment, in the discretion of the court.

(10) Applicability of Sections.—Sections three, four, six, nine, and twenty-seven, article one of this chapter, shall not apply to this article. All other sections of this chapter shall apply fully to this article.

(11) Provisions Severable.—If any part or section of this act shall be declared unconstitutional or invalid by any court, such declaration shall not affect any other part or section hereof.

(12) Article Nine, Chapter Thirty-three, Repealed.—Article nine, chapter thirty-three of the code of West Virginia, one thousand nine hundred thirty-one, is hereby expressly repealed.

APPENDIX B.

State of West Virginia Certificate.

I, STUART F. REED, Secretary of State of the State of West Virginia, do hereby certify that a Resolution and New Agreement duly acknowledged and accompanied by the proper certificates and affidavits, have this day been delivered to me, which Resolution and New Agreement are in the words and figures following:

WHEREAS, It is deemed desirable by the stockholders of the Fidelity Investment Association, a corporation created and organized under the laws of the State of West Virginia, that the objects and purposes for which it was incorporated be enlarged; therefore be it

RESOLVED, By the stockholders of said corporation in stockholders' meeting assembled. That the objects and purposes for which said corporation was incorporated be enlarged, in accordance with and by virtue of the authority of Section ten of chapter fifty four of the Code of West Virginia, so that said objects and purposes hereafter shall be those set forth in the following new agreement, which new agreement is hereby adopted to-wit:

I. The undersigned agree to be and continue a corporation by the name of Fidelity Investment Association.

II. The Principal Place of Business of said corporation shall be located as heretofore at No. 1229 Main Street in the City of Wheeling, in County of Ohio, and State of West Virginia. Said corporation shall have no chief works.

III. The objects and purposes for which this Corporation is formed are as follows:

To purchase, acquire, buy, sell, own, hold, dispose of and deal in stocks, bonds, mortgages, debentures, obligations, and other securities of corporations and persons for its own account and for others on commission; to loan money on real estate security; to loan money on personal and other security; to acquire, own, deal in and sell real estate, to erect houses thereon, rent and sell the same, to lay out real estate into divisions and and to sell and dispose of same; to deal in real estate and to buy, sell and exchange the same for others for a commission or reward; to underwrite in whole or in part any issue of stocks, bonds or other securities; to transact as agents on commission the general business of real estate and insurance in all its branches; to transact on commission the general business of a fiscal agent; to transact any other business incident to any of the above named enterprises which a person, firm or partnership might engage in or do.

To carry on, by purchasing existing businesses, or otherwise, the business of soliciting or receiving deposits or payments on any annuity contracts, certificates or annuity bonds; in fixed and stipulated instalments or otherwise; to acquire and sell and offer for sale or delivery any contract, certificate or bond, of any person, association or corporation, now or hereafter engaged in this state in the business of soliciting, or receiving deposits or payments of any kind of annuity contracts, certificates or annuity bonds; and further to engage in the business of placing or selling certificates, bonds, debentures, certificates of interest; or investment securities of any kind on the partial payment, instalment, or any other plan of payment, and providing for the sale, redemption, or retiring of the same or any part thereof; and generally to carry on all lawful business necessary or incidental to all or any of the above mentioned objects.

The designation of any one of the objects and purposes aforesaid is not intended and shall not be taken to be a

limitation or qualification upon any other of the said designated objects and purposes.

IV. The amount of the total authorized capital stock of said corporation will be Two Hundred Thousand (\$200,000) dollars, divided into two thousand shares of par value of one hundred dollars each, of which authorized capital stock the amount of Ninety Seven Thousand Five Hundred dollars has been paid.

V. The names and post office addresses of all the stockholders and the number of shares of stock subscribed for by each, are as follows:

<i>Name</i>	<i>Post Office Addresses</i>	<i>No. of Shares</i>
C. R. Hubbard	Wheeling, W. Va.	120
W. B. Irvine	Wheeling, W. Va.	38
J. F. Paull	Wheeling, W. Va.	78
Geo. W. Woods	Wheeling, W. Va.	53
J. D. Merriman	Wheeling, W. Va.	206
Frank Waterhouse	Wheeling, W. Va.	50
Mamie G. Waterhouse	Wheeling, W. Va.	56
August Rolf	Wheeling, W. Va.	20
Wheeler H. Bachman	Wheeling, W. Va.	20
H. W. Gee	Wheeling, W. Va.	50
J. A. Fletcher	Wheeling, W. Va.	15
J. M. Brown	Wheeling, W. Va.	20
Will S. Hohman	Wheeling, W. Va.	3
E. W. Oglebay	Wheeling, W. Va.	106
Henry G. Stifel	Wheeling, W. Va.	100
Wm. H. Irvine	Wheeling, W. Va.	25
N. A. Haning	Wheeling, W. Va.	15

VI. This Corporation is to expire fifty years from April 13, 1911.

VII. The President and Secretary of said corporation, by and with the advice and consent of the Board of Directors, may establish branches of said corporation, and make due and proper application to transact the business and there-

after transact the business of said corporation at any place or places in the United States or any foreign country.

Given under our hands this 9th day of December, 1912.

W. B. IRVINE.

J. D. MERRIMAN.

J. F. PAULL.

C. R. HUBBARD

H. W. GEE.

WHEELER H. BACHMAN.

FRANK WATERHOUSE.

WHEREFORE, The stockholders named in said New Agreement, and all the other stockholders of said corporation, and their successors and assigns, are hereby declared to be from this date until the Thirteenth day of April, 1961, a corporation by the name and for the objects and purposes set forth in said New Agreement; and that the said corporation shall henceforth be subject to such New Agreement as set forth in this Certificate in lieu of its original Certificate of Incorporation.

Given under my hand and the Great Seal of the said State, at the City of Charleston, this Tenth day of December, 1912.

(G. S.)

STUART F. REED,
Secretary of State.

STATE OF WEST VIRGINIA CERTIFICATE.

I, STUART F. REED, Secretary of State of the State of West Virginia, do hereby certify that J. F. Paull, President of Fidelity Investment & Loan Association, a corporation created and organized under the laws of the State of West Virginia, has certified to me under his signature and the corporate seal of said corporation, that, at a meeting of the stockholders of said corporation, regularly held in accordance with the requirements of the law of said State, at the office thereof, in the City of Wheeling, West Virginia, on the 30th day of November, 1912, at which meeting a majority of stock of such corporation being repre-

presented by the holders thereof in person or by proxy and voting for the following resolution, the same was duly and regularly adopted and passed, to-wit:

"RESOLVED, that the name of this corporation be changed from Fidelity Investment & Loan Association, its present name, to Fidelity Investment Association, by which latter name it shall hereafter be known."

WHEREFORE, I do declare said change of name to be authorized by law, and that the said corporation shall hereafter be known by the name of FIDELITY INVESTMENT ASSOCIATION.

Given under my hand and the Great Seal of the said State, at the City of Charleston, this Seventh day of December, 1912.

(G. S.)

STUART F. REED,
Secretary of State.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 319

FIDELITY ASSURANCE ASSOCIATION, A CORPORATION, DEBTOR, AND
CENTRAL TRUST COMPANY, TRUSTEE FOR FIDELITY ASSURANCE ASSO-
CIATION, *Petitioners,*

vs.

EDGAR B. SIMS, AUDITOR OF THE STATE OF WEST VIRGINIA, AND EX-
OFFICIO INSURANCE COMMISSIONER OF THE STATE OF WEST VIRGINIA;
ROSS B. THOMAS AND H. ISAIAH SMITH, WEST VIRGINIA STATE
COURT RECEIVERS; BANKING COMMISSION OF WISCONSIN; CHAS.
R. FISCHER, COMMISSIONER OF INSURANCE AND PERMANENT RECEIVER
FOR DEBTOR CORPORATION IN AND FOR THE STATE OF IOWA; JOHN B.
GONTRUM, INSURANCE COMMISSIONER OF THE STATE OF MARYLAND;
DEWEY S. GODFREY, MISSOURI STATE COURT RECEIVER; L. H.
BROOKS, TRUSTEE, FREDERIC LEAKE AND A. L. GOLDBERG, JR.,
TRUSTEE; AND SECURITIES AND EXCHANGE COMMISSION,

Respondents.

MOTION AS TO RECORD.

To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:

Now come your petitioners, Fidelity Assurance Associa-
tion, a corporation, Debtor, and Central Trust Company,
Trustee for Fidelity Assurance Association, and respect-
fully move the Court that, for consideration of the petition
for certiorari to the United States Circuit Court of Appeals
for the Fourth Circuit, the complete record in this case be

not printed, and that the said petition for certiorari be considered by this Honorable Court upon the appendices to the briefs filed in the Circuit Court of Appeals for the Fourth Circuit and the proceedings had in the said Circuit Court of Appeals.

The complete record in this case, much of which is irrelevant to the questions presented by the said petition, consists of approximately 4,000 pages of testimony and several thousand pages of exhibits. The statement of facts contained in the opinion of the District Court and the statement of facts contained in the opinion of the Circuit Court of Appeals fairly state the pertinent facts of the case, and the questions presented by the petition for certiorari can be decided on the portions of the record embodied in the said appendices, supplemented by the proceedings in the Circuit Court of Appeals.

A transcript of the complete record, duly certified by the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, has been filed with the Clerk of this Honorable Court, and if certiorari be granted by this Honorable Court as prayed by your petitioners, your petitioners will cause to be printed all of the record or so much thereof as counsel for the parties may by stipulation deem to be necessary.

Respectfully submitted,

JAMES R. FLEMING,

HOMER A. HOLT,

*Attorneys for Fidelity Assurance
Association, Debtor.*

THOMAS C. TOWNSEND,

*Attorney for Central Trust Com-
pany, Trustee for Fidelity As-
surance Association.*

JOHN V. RAY,
*Of Counsel for Fidelity Assurance
Association, Debtor.*

HILLIS TOWNSEND,
JOHN T. KEENAN,
*Of Counsel for Central Trust Company,
Trustee for Fidelity Assurance Association.*

(1757)

